

# The F.C.C.'s 'Pioneer' Policy Comes Under Attack

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portion of the spectrum for a new use was obliged to describe it in detail to potential competitors. And once the new use was approved, the innovator was forced to get in line all over again, this time to convince the commission that no one else could provide better service.

On its face this seems unfair, offering an advantage to those exploiting the ideas of others. Worse, at least from an economist's perspective, it seems inefficient: without the incentive of a reward, one would expect some worthy innovations to be still-born and others long delayed. "Why else would anyone take the chance?" Douglas Smith, the president of Omnipoint, asked.

The F.C.C. opened the door to would-be pioneers in 1991, requiring them to show that their innovations passed hurdles of originality and social value. And in one case, the process proved relatively uncontroversial. The commission gave a preferential license to Cellular Vision, a New Jersey company that developed a technique for broadcasting dozens of television signals within urban areas at superhigh frequencies previously thought to be of little commercial use.

But the commission crossed into contentious territory when it invited similar applications for licenses to provide personal communications services, a souped-up version of cellular mobile communications that would operate on a less crowded part of the radio spectrum. The staff was forced to review 96 requests for pioneer preference; even after disqualifying many on their face, it was left to wrestle with the competing claims of 57, including industry heavyweights A.T. & T., Bell Atlantic, Time Warner, Pacific Bell, Tele-Communications, Southwestern Bell, Cablevision and Ericsson.

The commission announced tentative awards in October 1992 to Omnipoint; to American Personal Communications, a joint venture of the Washington Post Company and a cellular-phone entrepreneur, Wayne Schelle, and to Cox Enterprises, a big West Coast cable television company. Many of those denied pioneer preference appealed on the ground that their own contributions were more significant than those of the three winners.

The voices in opposition grew louder in September 1993, when the com-

mission solicited advice on whether Congress's decision to auction most of the personal communications services licenses to the highest bidders justified modifying the pioneer preference awards or dropping them entirely. But since neither direction of attack apparently moved the commission — the original decision was reaffirmed in December 1993 — the issue is far from dead.

## Brief Explanations

The F.C.C. has offered brief explanations for each of the awards. Omnipoint was cited for early development of hand-held phones that operate in the higher frequencies set aside for personal communications services. Cox got the nod for linking mobile

awards, F.C.C. commissioners and staff logged at least 26 contacts with representatives from the three tentative winners.

## 'By the Book'

These contacts violated no rules if, as the record formally shows, the only subject discussed was the general question of whether the commission should amend the pioneer preference process in light of Congress's decision to auction some of the personal communications services licenses, rather than the specific issues of whether the three companies deserved pioneer preference.

Mr. Smith, the president of Omnipoint, dismissed the charge on just these grounds: "We did everything by the book." So did Cox Enterprises. Their lawyer, Werner Hartenberger, said "there is no basis to Pacific Telesis's claim." And American Personal Communications released a statement that "the allegation is groundless."

But Pacific Telesis doubts that this legal line will hold. And last week a lawyer for the company notified the F.C.C. that it intended to seek "judicial review."

Whatever the outcome of this high-stakes struggle, the controversy is bound to stimulate the broader debate over the question of whether the benefits of pioneer preferences are likely to outweigh the costs.

Mr. Smith of Omnipoint contends that the explosion of applications for experimental licenses that occurred after the commission's decision to entertain pioneer preferences shows that the incentive is effective. Indeed, he argues that in stimulating early innovation by dangling the prospect of free licenses to pioneers, "whatever bidders pay in the auctions, they will pay more because of pioneer preferences."

## 'Compared to What'

But Mr. Geller, the former general counsel to the F.C.C., is deeply skeptical. His own advocacy of pioneer preferences, he says, stemmed from despair over the commission's ability to decide through public hearings who could make the best use of the spectrum, and the sheer illogic of what was then the only legal alternative: parceling out billions of dollars worth of spectrum through gold-rush-style lotteries. But "everything in life is 'compared to what,'" he said. And by invoking the free market principle of letting applicants demonstrate their convictions with their check-

books, "auctions make pioneer preferences unnecessary."

By the same token, Chuck Jackson, a telecommunications consultant in Maryland, believes that the burden of deciding which innovators qualify as pioneers in hotly contested proceedings strains the commission's administrative capacities. And in the personal communications services proceeding, he fears the pressure to make awards led the commission astray. "You can make a good case that nobody deserved a pioneer's preference," he said.

Commissioner Erwin Duggan, who voted to award the three pioneer licenses for personal communications services, alluded to his own misgivings in a public statement last month. "It is no secret that I have long been a skeptic about the wisdom of the F.C.C.'s pioneer preference policy," he wrote. Pioneer preferences, he cautioned, should be granted in a "most austere and sparing fashion."

## Valuable Prizes

The controversy over pioneer preferences, it is safe to say, would be tempered if the prizes were less valuable. A midrange estimate offered by the Office of Management and Budget puts the number in the range of \$18 a person for the licenses given to the pioneers — close to half a billion dollars for New York alone.

But that point only highlights the second part of the problem. Even if applicants can meet some objective test as innovators, how is the commission to decide the size of the prize? Janice Obuchowski, a former Bush Administration telecommunications policy adviser who consults for American Personal Communications, acknowledges that the commission "needs to look at the reward system prospectively."

Just when or how the F.C.C. will respond to the quarrel over pioneer preferences in general and personal communications services licenses specifically is not known — and probably will not be known for some time. By early February, two of the five commission seats will be empty. Of the three commissioners remaining, one of them — the chairman, Reed Hundt — is taking no part in the proceedings because he earlier represented Bell Atlantic, a party to the dispute. Meanwhile, Bruce Franca, the commission's deputy chief engineer, said "we will do the best job we can in the circumstances."

## License awards face challenges from a number of competitors.

phones to a cable television distribution system. And American Personal Communications was selected for its research in how personal communications services might share a chunk of the radio spectrum with existing microwave users.

The rationale has been challenged by a number of competitors, and often in language that betrays the frustration of companies that may now be forced to bid for a single broad band of spectrum in three key markets. GTE said the awards were based on "irreconcilable distinctions" and "accomplishments that are clearly existing technology." Bell Atlantic said that "three of the four elements have nothing to do with technological innovation and risk taking," the justification cited for the award to American Personal Communications. The Qualcomm Corporation, a major supplier to the mobile communications industry, argued that "there is no convincing evidence that Omnipoint actually demonstrated an operational system."

Pacific Telesis has just escalated the battle by questioning the fairness of the decision process. In F.C.C. proceedings to determine licensing, informal "ex parte" contact between interested parties and commission members or staff is prohibited. Yet in the two months preceding the final

# Trustee Accuses Towers of Misusing \$400 Million

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losses, which Hoffenberg systematically covered up by publicly report-

sign that he has not been able to find adequate assets at Towers Financial to pay back the company's creditors. By suing Mr. Hoffenberg and nearly two dozen associates and employees of Tower, Mr. Cohen is hoping to recover some money

beyond the S.E.C. suit."

In March, Towers Financial filed for bankruptcy, the day after five of its subsidiaries did the same. At that time, Towers said it had \$251.7 million in assets and \$271.6 million in liabilities. But the assets listed in

that Mr. Hoffenberg and Towers had persuaded what it estimated to be 2,800 investors in 40 states to lend money by supplying them with accounting statements that overstated the company's assets, profits and net worth "by staggering amounts." If

# Pacific Telesis Threatens Suit Over FCC Wireless Awards

■ **Technology:** It says rivals who received PCS licenses may have broken the rules through repeated contact with the agency.

By JUBE SHIVER Jr.  
TIMES STAFF WRITER

WASHINGTON—When the Federal Communications Commission last year invited comment on rules to establish a new technology called wireless personal communications services, Pacific Telesis discovered that some of its competitors seemed especially eager to offer advice.

In the two months leading up to a Dec. 23 decision awarding free franchises for the new technology, officials of two of the three winning firms were repeatedly in touch with the FCC, in possible violation of rules, PacTel complained last week.

PacTel, whose cellular phone business is threatened by the new PCS technology, called for a review and threatened to sue to overturn the award—one of numerous challenges considered likely as this summer's high-stakes auction of further PCS franchises draws near.

At issue is the so-called pioneer's preference rule, by which those deemed to be technological leaders in a field are awarded free franchises while others must bid huge sums—\$250 million or more—at a fran-

chise auction.

The potentially lucrative franchises will enable the transmission of voice, data and video communications via wireless transmitters that experts say will eventually be as portable and unobtrusive as a wrist-watch.

The FCC voted last week to uphold the pioneer's preference rule. But Commissioner Ervin S. Duggan issued a statement warning of the policy's "potential dangers." He said those include "politicizing" the awards, difficulty in determining "what constitutes true innovation" and "being caught up in endless litigation."

PacTel complained that American Personal Communications of Washington huddled with FCC officials 25 times before winning a free franchise and that another firm, little Omnipoint Communications of Colorado Springs, Colo., contacted the FCC 11 times.

The contacts were permissible as long as they were limited to discussions about PCS technology. But in a five-page letter to the FCC on Friday, Pacific Telesis alleged that the discussions may have been aimed at

influencing more important decisions the FCC was undertaking at the time. The review of pioneer's preferences was itself controversial.

"The three recipients of [FCC] awards... all made ex parte contacts with the FCC," Michael R. Keilner, a lawyer for Pacific Telesis, wrote in the letter.

He added that the FCC had previously warned that failure to comply with ex parte rules "could result in the imposition of sanctions."

More than 50 companies sought a franchise for inventing PCS technology, but only three—Omnipoint, American Personal Communications and Cellular One—received free licenses. Cellular One, based in Atlanta, received free licenses for PCS in Southern California, Washington, New York and Washington.

Pacific Telesis was among the other applicants. It has a cellular telephone franchise and would like to play a major role in PCS technology, which is seen as a major competitor to cellular.

Officials at Cox could not be reached for comment. American Personal Communications dismissed the allegation of ex parte contact as "groundless," and Omnipoint President Douglas Smith said an overwhelming number of those who commented on the pioneer's preference rule supported Omnipoint.

"We did not violate any ex parte rules,"

Keilner, whose company employs about 100 people. "The fact that Pacific Telesis is bringing up an unfounded technicality as their objection shows you how weak their case is."

But some critics say the PCS awards are a reflection of the companies' inventiveness and of their persuasive powers in convincing FCC officials that they deserve the awards. "It's a technology that was being worked on by a host of firms,"

Keilner said. "The free licenses give the winners a huge competitive advantage over other firms that are expected to bid as much as \$250 million each for similar licenses to operate on the public airwaves."

"This pioneer's preference is a stupid policy. The government doesn't go around setting aside oil leases for people who come up with an innovative way to drill for oil," said former FCC general counsel Henry Geller, who is now a private Washington communications lawyer for public interest groups.

Geller crusaded for such free awards when he worked for the FCC, but he now says his previous position was a mistake.

That wasn't the outcome the FCC envisioned when it adopted its pioneer's preference rule in 1991. The agency embraced the idea in an effort to reform a half-century-old license-approval process that

many believed worked against entrepreneurs who had spent their time and money inventing new communications technology.

Until the early 1980s, the FCC allocated the airwaves through administrative hearings that subjectively evaluated competing applicants.

Under that system, an inventor seeking to convince the FCC to set aside part of the airwaves for a new use was obliged to describe his technology to the agency as well as potential competitors.

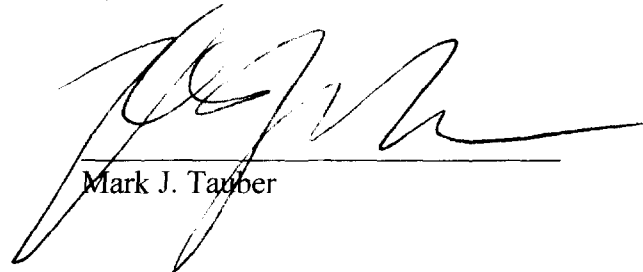
Once a new use was approved, the inventor had to beat the drum again—this time to convince the FCC that no one else could provide better service with the new technology.

One early test of the pioneer preference rule proved uncontroversial. In 1992 the FCC gave a preferential license to Cellularvision, a Freehold, N.J. company that patented a new way to broadcast cable television programming at superhigh frequencies previously believed to be too volatile for commercial use.

But the stakes have risen, as the FCC prepares this summer to auction off part of the airwaves for PCS and other services that could raise as much as \$10 billion. Given the money at stake, PacTel says it, for one, anticipates "judicial review" of the FCC's pioneer's preference awards.

**CERTIFICATE OF SERVICE**

I, Mark J. Tauber, certify that on this 1st day of February, 1994, I caused copies of the foregoing Letter to Andrew S. Fishel to be served by first class mail, postage prepaid, on the parties on the attached service list.



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